STATE OF MICHIGAN

COURT OF APPEALS

LARRY M. LEDESMA,

Plaintiff-Appellant,

v

CONSUMERS ENERGY and NUCLEAR MANAGEMENT CO., LLC,

Defendant-Appellees.

UNPUBLISHED
July 5, 2005

No. 253359
Jackson Circuit Court
LC No. 01-00321-CZ

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Plaintiff Larry M. Ledesma appeals as of right from an order granting defendants Consumers Energy (Consumers) and Nuclear Management Co.'s (NMC)[1] motions for summary disposition pursuant to MCR 2.116(C)(10).[2] The trial court determined that plaintiff failed to establish a prima facie case of racial discrimination under the Elliott-Larsen Civil Rights Act (CRA)[3] under either a disparate treatment or hostile work environment theory. We affirm the

[1] NMC took over management of Consumers' Palisades Nuclear Power Plant in July of 2001. Plaintiff was allowed to amend his complaint to add NMC as a named defendant.

[2] Plaintiff's complaint was originally filed as part of a multi-plaintiff suit against Consumers for racial discrimination. The cases were severed below, but were reconsolidated for purposes of discovery. All but four claimants settled following mediation. The claims of the four remaining plaintiffs were dismissed following discovery due to federal preemption and for failure to create an issue of material fact. The appeals of the three other remaining claimants are being considered along with that of plaintiff in Docket Nos. 253009, 255560, and 255561.

[3] MCL 37.2101, *et seq.* The relevant section of the CRA provides:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . race . . . . [MCL 37.2202(1)(a).]

trial court's dismissal of plaintiff's disparate treatment claims. However, we reverse the trial court's dismissal of plaintiff's hostile work environment claims, as we find that plaintiff presented sufficient evidence to create a genuine issue of material fact and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

Plaintiff, who is Hispanic, began working for Consumers in 1985 as a temporary unskilled worker at its Palisades Nuclear Power Plant. Plaintiff worked for eighty-nine days in the mechanical maintenance department as a tool keeper during this period of temporary employment. In 1986, plaintiff was hired permanently as a janitor. In 1990, he transferred into the radiation waste department and was later promoted to a senior radiation waste material handler (Radwaste Handler A). Radwaste handlers undergo more direct, frequent, and continual exposure to radiation than most other positions at the plant. The handlers rotate positions to equalize radiation exposure among the employees and must continually monitor their dosage. Due to the dangers of radiation exposure, plaintiff, along with several other radwaste handlers, applied on several occasions for posted positions in the mechanical maintenance department. These positions were not only safer, but also provided higher pay and better advancement opportunities. According to the collective bargaining agreement, Consumers was required to hire qualified applicants by seniority.

In 2001, plaintiff filed a grievance when he applied for and was denied a position of "Mechanical Repair Worker A." Plaintiff was also denied a position of temporary tool keeper in 2001, which would have given him the necessary mechanical experience for future advancement. Throughout his employment, plaintiff has been reprimanded for poor attendance and, before 1995, his performance evaluations were less than exemplary. Plaintiff took a mechanical aptitude test required for transfer into the mechanical maintenance department in 1986, and received a failing score.[4] However, plaintiff alleged that defendants purposely promoted white employees into these desired positions and kept minorities in the radwaste department due to the higher level of danger and lower pay.

Plaintiff also alleged that defendants allowed for the existence of a racially hostile work environment. Plaintiff testified in his deposition that other employees at the plant made derogatory comments to him regarding his ethnicity.[5] He did not find it necessary to report these incidents as they occurred in front of his supervisor. Plaintiff also heard employees use racially

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[4] In order to be considered for a "Mechanical Repair Worker A" position in the mechanical maintenance department, an applicant needs two years experience in a lower position in that department, such as a tool keeper, as well as a passing score on a mechanical aptitude test. Consumers presented evidence that it may waive a requirement for employment when none of the candidates possess all of the requisite qualifications. However, when plaintiff was denied these positions, there were other candidates who did possess all of the requisite qualifications.

[5] Other employees commented that it was time for plaintiff's siesta and called him by derogatory names.

derogatory names to refer to African-Americans in front of managers who would either laugh or walk away. Plaintiff once saw an employee wear a Confederate flag hat at an employee meeting in front of several supervisors. Plaintiff was present when a supervisor, Richard Henry, used a racially derogatory word to refer to African-Americans in front of several employees in the break room. Plaintiff reported this incident to his union steward and Mr. Henry was subsequently fired. Since Mr. Henry's termination, several employees and supervisors at the plant refuse to speak to plaintiff. Plaintiff also testified that he was aware of several incidents in which nooses were placed around the plant, although he had never seen one.[6] While a noose is a symbol of racial violence toward African-Americans, plaintiff asserted that, as a minority, the presence of these nooses made him uncomfortable in the workplace.

Following discovery, the trial court dismissed plaintiff's claims. The court found that plaintiff's disparate treatment and hostile work environment claims lacked a factual basis. Plaintiff failed to present evidence that he was qualified for the positions for which he was rejected and he failed to present any evidence that minority radwaste handlers were kept in that department due to the high level of radiation exposure. The court also found that plaintiff was unable to present sufficient evidence regarding reported incidents pertaining to negative attitudes toward *his* ethnicity to support his hostile work environment claim. Although the trial court did not dismiss plaintiff's disparate treatment claims on the basis of federal preemption as requested by defendants, the court noted that these claims would be preempted by § 301 of the federal Labor Management Relations Act (LMRA)[7] as their consideration required referencing the collective bargaining agreement. This appeal followed.

II. Racial Discrimination

Plaintiff asserts that the trial court erred in concluding that defendants were entitled to summary disposition of his disparate treatment and hostile work environment claims pursuant to MCR 2.116(C)(10). We review a trial court's determination regarding a motion for summary disposition de novo.[8] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.[9] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we

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[6] A security guard admitted to placing one such noose in the factory. He was suspended for his conduct.

[7] 29 USC 185(a). This section of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties. [29 USC 185(a).]

[8] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

[9] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[10] Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.[11]

A. Disparate Treatment

A plaintiff may prove disparate treatment by either direct or indirect evidence.[12] Absent direct evidence of discrimination, as in this case, a plaintiff must proceed under the shifting burdens of proof articulated in *McDonnell Douglas Corp v Green*.[13] To establish a prima facie case under *McDonnell Douglas*, a plaintiff must prove that: (1) he was a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position for which he applied; and (4) the adverse employment action occurred under circumstances giving rise to an inference of unlawful discrimination.[14] If a plaintiff establishes a prima facie case, "a presumption of discrimination arises."[15] Thereafter, the defendant bears the burden of articulating a legitimate, nondiscriminatory reason for its employment decision.[16] Once the defendant articulates such a reason, the plaintiff must present evidence that the articulated reason is mere pretext.[17]

There is no dispute that, as an Hispanic-American, plaintiff is a member of a protected class and that he suffered adverse employment actions when he was denied promotion to the mechanical maintenance positions for which he applied. However, plaintiff failed to present evidence that he was qualified for these positions. Plaintiff failed to refute defendants' evidence that passing the Bennett Mechanical Test was required for these positions and that plaintiff received a failing score on this test.[18] Although plaintiff had some prior experience in the mechanical maintenance department, he failed to establish that this made him more qualified than other applicants with all of the requisite qualifications. Furthermore, plaintiff failed to establish that the adverse employment actions occurred under circumstances giving rise to an inference of racial discrimination. He failed to present any evidence that the employees selected

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[10] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[11] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

[12] *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132; 666 NW2d 186 (2003).

[13] *Hazle v Ford Motor Co*, 464 Mich 456, 463-464; 628 NW2d 515 (2001), citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

[14] *Id.* at 463.

[15] *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173; 579 NW2d 906 (1998).

[16] *Hazle*, *supra* at 464.

[17] *Id.* at 464-466.

[18] Defendants submitted this test into evidence.

for these positions were unqualified. We also note that white radwaste handlers who applied for the same positions were also denied promotion on the basis of lack of qualification. Accordingly, the trial court properly determined that plaintiff failed to meet his burden of establishing a prima facie case of disparate treatment.

As plaintiff failed to meet his initial burden, we need not consider whether defendants articulated a legitimate, nondiscriminatory reason for their employment decisions or whether this reason was mere pretext. However, we note that defendants did articulate such a reason for their employment decision—the fact that plaintiff was not qualified for the positions for which he applied while the selected applicants were qualified. Plaintiff has presented no evidence that defendants adhered to the qualification standards for discriminatory purposes.[19]

B. Hostile Work Environment

Plaintiff asserts that the trial court improperly dismissed his claim that defendants maintain a racially hostile work environment. To establish a prima facie case of a racially hostile work environment, plaintiff must demonstrate that (1) he belonged to a protected group; (2) he was subjected to unwelcome communication or conduct on the basis of his race; (3) "the unwelcome . . . conduct was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment;" and (4) the employer is responsible for the actions of its employees under the doctrine of respondeat superior.[20]

"[T]o survive summary disposition, plaintiff [must] present documentary evidence to the trial court that a genuine issue existed regarding whether a reasonable person would find that, in the totality of circumstances [the alleged conduct was] sufficiently severe or pervasive to create a hostile work environment."[21] "[W]hether an environment is 'hostile' can be determined by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[22]

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[19] The trial court also indicated that, if it had not dismissed plaintiff's disparate treatment claims pursuant to MCR 2.116(C)(10), it would have found these claims preempted by § 301 of the LMRA. We briefly note that such a dismissal would have been improper. See *Betty v Brooks & Perkins*, 446 Mich 270; 521 NW2d 518 (1994); *Donajkowski v Alpena Power Co*, 219 Mich App 441; 556 NW2d 876 (1996); *Hall v Kelsey-Hayes Co*, 184 Mich App 277; 457 NW2d 143 (1990). However, we decline to review the issue in greater detail as the trial court did not base its ruling on the issue of preemption and as the trial court's dismissal of these claims on other grounds was proper.

[20] *Quinto v Cross & Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996), quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993) (alteration in original).

[21] *Id.* at 369. See also *Chambers v Trettco, Inc*, 463 Mich 297, 319; 614 NW2d 910 (2000).

[22] *Quinto, supra* at 370 n 9, quoting *Harris v Forklift Systems, Inc*, 510 US 17, 22-23; 114 S Ct
(continued…)

However, a plaintiff must be aware of the unwelcome communication or conduct in order to allege that it specifically affected his work environment.[23] "A hostile work environment cannot stand as [an arbitrary barrier in the workplace] until there is some affirmative manifestation of it to the complaining party or parties, and then becomes actionable only when 'sufficiently severe and persistent to affect seriously the psychological well being' of the employees in question."[24]

We agree with plaintiff's contention that the trial court improperly failed to consider evidence presented regarding the discovery of nooses around defendant's plant and the use of derogatory terms to refer to African-Americans. Although not directed at his minority status, this conduct created a highly-charged atmosphere in which any employee, especially one of minority status, would feel uncomfortable. Based on this evidence, it is clear that the trial court improperly dismissed plaintiff's hostile work environment claim. There is strong evidence that a racially hostile environment exists at defendants' Palisades Nuclear Power Plant. Plaintiff raised serious allegations regarding highly improper racially-motivated conduct at defendants' plant. According to plaintiff's deposition testimony, he was directly affected by racial animus when other employees made derogatory comments regarding his ethnicity; he became aware that several nooses were found around the plant; and he heard racial comments being made to and about other minority radwaste handlers and about minorities in general.[25] This evidence was corroborated during discovery by the depositions and affidavits of several other claimants. This conduct and communication, if proven, would certainly be sufficiently severe or pervasive to create a hostile work environment.[26] There is abundant evidence that plaintiff and other minority

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(…continued)

367; 126 L Ed 2d 295 (1993).

[23] See, e.g., *Langlois v McDonald's Restaurants of Michigan, Inc*, 149 Mich App 309, 317; 385 NW2d 778 (1986) ("We conclude that plaintiff cannot rely upon incidents of sexual harassment of which she was unaware to establish that she was subjected to a hostile work environment for purposes of the Elliott-Larsen Civil Rights Act."). In *Langlois*, the plaintiff learned that two other female employees had been sexually harassed by a supervisor after she reported her own single incident of harassment and the supervisor had been fired. As she was unaware of the incidents, they could not have affected her work environment. *Id.*

[24] *Id*.

[25] Although plaintiff did not actually see the nooses or hear all the racial epithets being used around the plant, these statements are not hearsay and, therefore, are admissible to establish plaintiff's hostile work environment claim. Evidence of the incidents involving nooses and racially derogatory comments merely establish the existence of these statements, and obviously not the substance of the underlying racial epithets. Similarly, in a defamation action, a plaintiff must first establish the publication of a communication, the very fact that a statement was made. The existence of that statement is the crux of the plaintiff's action. See *Colista v Thomas*, 241 Mich App 529, 538-539; 616 NW2d 249 (2000).

[26] Plaintiff also alleged that he was under stress due to constant comments by unnamed workers around the plant regarding his inability to secure a mechanical maintenance position. However, plaintiff never asserted that these comments were based on race and he never reported the incidents to defendants.

claimants worked every day in a climate where the use of racially derogatory words and symbols of racial hatred were commonplace. In light of this evidence, plaintiff created a genuine issue of material fact that he was subjected to unwelcome communication or conduct on the basis of his race and this communication and conduct placed him in a threatening and hostile work environment.

Plaintiff also presented sufficient evidence regarding defendants' knowledge of this climate to overcome defendants' motion. To hold an employer liable under the doctrine of respondeat superior, a plaintiff must present evidence that the defendant had notice of the hostile work environment and failed to take prompt and adequate remedial action.[27] There was evidence that defendants had notice of general race-based issues in the plant. Evidence was presented that racially derogatory comments were often made in the presence of supervisors, who either took no action or laughed. Defendants were also aware of the discovery of nooses. Defendants' investigation of one such incident resulted in the suspension of a security guard. There was also evidence that an employee-based minority advisory panel had presented their concerns regarding these incidents to plant management.

Defendants did take some action regarding these incidents and the general racial hostility in the plant; however, a factual issue remains regarding the adequacy of these measures. Defendants terminated Mr. Henry's employment after making a racially negative comment in front of several employees. However, there was evidence that supervisors took no action upon hearing racially negative comments in the plant. Defendants did implement a diversity training program. Even though the racially hostile atmosphere had existed for several years, the program was not scheduled to begin until 2003. An armed security guard who admitted to placing a noose on plant grounds received only a short suspension. In response to the discovery of other nooses, defendants placed a non-specific sign on the fabrication shop door that "Offensive comments or actions are no joking matter." There was also evidence that other incidents were never investigated as the nooses were simply thrown away. In light of this evidence, dismissal of plaintiff's hostile work environment claim was improper.

We affirm the trial court's dismissal of plaintiff's disparate treatment claims pursuant to MCR 2.116(C)(10). However, we reverse the trial court's court dismissal of plaintiff's hostile work environment claims and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen

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[27] *Chambers, supra* at 312-313.